BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Joint Application of SBC Communications Inc. ("SBC") and AT&T Corp. ("AT&T") for Authorization to Transfer Control of AT&T Communications of California (U-5002), TCG Los Angeles, Inc. (U-5462), TCG San Diego (U-5389), and TCG San Francisco (U-5454) to SBC, Which Will Occur Indirectly as a Result of AT&T's Merger With a Wholly-Owned Subsidiary of SBC, Tau Merger Sub Corporation.	Application 05-02-027 (Filed February 28, 2005)

ADMINISTRATIVE LAW JUDGE'S RULING REGARDING MOTION TO COMPEL FILED BY ESCHELON AND ATI

This ruling grants, in part, the motion filed on June 10, 2005, Eschelon Telecom, Inc. and Advanced TelCom, Inc. (together, Eschelon or Movants) to Compel Responses from SBC Communications, Inc. and AT&T Corp. (collectively, "Joint Applicants"), to Modify the Nondisclosure and Protective Agreement, for Clarification of Administrative Law Judge's (ALJ) ruling, (Motion) in this proceeding.

The Joint Applicants filed a response in opposition to the Motion on June 15, 2005.

Eschelon asks that Applicants be compelled to respond fully to all discovery requests unless a fact-specific, court-sanctioned objection is applicable. Eschelon further asks the Commission to modify the Applicants' Protective Agreement to ensure that the Commission, not the Applicants, determines

reasonable discovery rights and the proper boundaries of intervenor participation. Eschelon also asks for an exception for "small companies" access to confidential documents. Eschelon further requests the Commission to clarify its *June 9 Ruling* to make clear that Eschelon's counsel and witnesses may obtain access to confidential documents. As part of the "small-company" designation, Eschelon requests that the ALJ clarify that the limitation placed on access to the four documents in the *June 9 Ruling* is not meant to extend to further documents in this proceeding.

Disposition of Disputed Issues

Position of Applicants

Applicants filed a response in opposition to the Motion on June 15, 2005, arguing that Eschelon seeks to "eviscerate" the prior ALJ Ruling by allowing employees involved in competitive decision-making access to Applicant's competitively-sensitive information. Applicants claim that Eschelon merely repeats arguments in its June 3, 2005 reply to XO's Comments.[1] Applicants argue that Eschelon ignores the ALJ's June 9 Ruling giving the reasons why such employees cannot be granted access to competitively-sensitive information.

SBC objected to Eschelon's data requests issued on May 9, 2005, including a request to serve Eschelon with copies of Applicant responses to other intervenors' data requests. SBC responded that it would not allow Eschelon's witnesses access to any confidential material in this proceeding because: (1) the material was "competitively sensitive information" (2) Eschelon is not a public

[1] *See* Comments of Eschelon, Telecom, Inc. and Advanced Telecom, Inc. in Support of the May 10, 2005 Comments of XO Communication, Inc., filed by Eschelon on June 2, 2005.

interest group such as TURN and ORA, but is a competitor; and (3) SBC had determined that much of the requested material was beyond the scope of Eschelon's filed Protest, claiming that "the change in control will harm competition."

SBC has provided to Eschelon's counsel and to its California outside counsel, Richard Levin, copies of discovery requests received by SBC, with portions of ORA's and TURN's requests excluded as confidential. SBC has also provided copies of its responses to XO, Telscape, and CALTEL. SBC, however, asserts that Eschelon's witnesses and employees may not view any confidential portions of these materials.

Access to Confidential Documents by In-House Employees

Eschelon and Applicants are in dispute over whether access to any confidential materials should be granted to Eschelon's witnesses. Applicants required a job description of Eschelon's undersigned counsel so that AT&T could "determine whether [it] can produce documents to you." (Ex. 5.)

Eschelon seeks to compel Applicants to share confidential documents with Eschelon's employee witnesses even though they do not meet the "permitted regulatory employee" criteria set forth in the June 9 ruling. The Ruling permitted Applicants to withhold access to confidential documents from "non-regulatory personnel (including attorneys) who are engaged in developing, marketing or pricing competitive products or services as previously described." (Ruling at 7.) Applicants thus argue that they have a right to deny such access to

prevent Eschelon from engaging in unfair competition through access to Applicants' competitively-sensitive information.[2]

Eschelon argues, however, that no employee of any telecommunications company would have access to confidential material if they were unavailable to employees who "…engage in any activities for the company relating to developing, planning, marketing, or selling products or services, determining the costs thereof, or designing prices thereof to be charged to customers." Eschelon claims that every aspect of a telecommunications company relates in some way to selling the company's products or services. Eschelon argues that in any event, this standard should not apply so broadly as contended by Applicants. Eschelon contends that SBC should provide a standard whereby Eschelon could ascertain if the standard is being fairly applied or if Eschelon might provide another employee witness that would be acceptable to SBC.

Small Company Exception

Eschelon argues that a "small company" exception should be permitted for access to confidential documents similar to what was applied in the Nine-Month

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[2] *See Fireman's Fund Ins. Co. v. Superior Court*, 233 Cal.App.3d 1138, 1141 (1991) (holding trial court abused its discretion by ordering production of documents containing commercially sensitive information to a competitor "without first reviewing them *in camera* . . . to determine whether they were of any value to the [requesting party's] case and whether sensitive matter should be excised before disclosure"); *GT, Inc. v. Superior Court*, 151 Cal.App.3d 748, 751-52 (1984) (affirming counsel-only protective order granted to prevent competitors from viewing each other's financial information); *Compaq Computer Corp. v. Packard Bell Electronics, Inc.*, 163 F.R.D. 329, 338-39 (N.D. Cal. 1995) (holding that discovery of commercially-sensitive information may be obtained upon a showing of substantial need and pursuant to a protective order limiting disclosure to outside counsel only); *see also* Civ. Proc. Code §§ 2031(e)(1), 2031(e)(5) (authorizing courts to fashion protective orders restricting production of or access to "trade secret or other confidential research, development, or commercial information").

FCC Triennial Review Order (TRO) Proceeding (R.95-04-043 / I.95-04-044). A protective agreement with a "small-company" designation was approved in the TRO proceeding granting access to documents with fewer restriction for a company with fewer than 3,000 employees. Eschelon states that it is approximately one-third the size of the standard for companies allowed greater access in the TRO ruling and protective order. Eschelon thus asks that it be granted a "small company exception" to allow its employee / witnesses who have signed the protective agreement and are willing to work under their counsel's direction access to Applicants' confidential documents. Eschelon seeks this exception even for employees / witnesses who do not meet the restrictions imposed in the June 9 ALJ ruling regarding employees that engage in marketing or related activities.

Eschelon argues that it should not be subject to the restrictions on access to confidential materials relating to in-house employees because it cannot afford to hire outside consultants to review and testify regarding Applicants' competitively-sensitive information. Eschelon argues that it would be "blocked" from these proceedings unless its employees are allowed access to Applicants' competitively-sensitive information. (*See* Motion at 9-10.)

Eschelon argues that it brings an important small-to-medium business customer perspective to the proceeding. Eschelon asserts, however, that it does not have the financial resources to regularly employ professional witnesses who are isolated from day-to-day company issues between regulatory proceedings, or to hire outside consultants whenever the company wishes to participate meaningfully in regulatory hearings. Eschelon must use its limited number of employees who have the particular subject matter expertise to contribute valuable testimony in the proceeding. (Ex. 7, Declaration of J. Jeffery Oxley.)

Applicants oppose a small company exception, and argue that in any case, it should not be applied to Eschelon. Applicants claim that Eschelon has the financial resources to participate fully in these proceedings. Eschelon operates in 19 markets in eight states, with annual revenues of approximately $200 million. (See Dorgan Decl. Ex. 5.) Applicants argue these statistics indicate that Eschelon is not a small company. Applicants thus dispute Eschelon's claim that it is too small to afford an outside expert.

Applicants argue that Eschelon's data requests at issue here seek a much broader array of competitively-sensitive information than was present in the FCC Triennial Review proceeding cited by Eschelon as an example. Eschelon is seeking access to what Applicants consider to be their most competitively-sensitive information.

Applicants argue, moreover, that the protective order in the TRO Proceeding is not applicable here because the nature of that proceeding did not lend itself to requiring ILECs to divulge high level strategic planning documents to the CLECs. Rather, in the TRO Proceeding, most of the relevant information for making such determinations resided with the CLECs themselves, not the ILECs.

Applicants argue that the scope of competitively-sensitive information sought by the parties during discovery in this proceeding is different compared with the more general industry-wide information gathering in the TRO Proceeding.

Discussion

Eschelon's motion is denied to the extent that it seeks an exception from the restrictions on access of confidential materials to the Eschelon employees since their job descriptions indicate that they are engaged in competitive

activities. One of the two Eschelon employees' job responsibilities includes "provid[ing] analysis and assistance to business units on cost and policy issues." (Dorgan Decl. Ex. 4 at 3.) The other's includes tasks such as "negotiat[ing] local, long distance, CABS, IP services and network backbone vendor contracts and provide financial analysis in determining most favorable rates / conditions / terms of the contracts." (*Id.* at 6.)

Eschelon has not justified that it should be granted an exception on the basis that it is a "small company" under the criteria applied in the TRO proceeding.

Access to Documents by In-House Counsel

Eschelon claims that AT&T has refused access to *any* confidential documents for Eschelon's in-house attorney, or to provide the in-house attorney even the redacted versions of the documents. Movants claim that AT&T has refused to send Eschelon's in-house attorney *public* documents if they were part of a party's response that included any document for which *any level* of confidentiality was asserted. Eschelon signed and delivered to AT&T a Protective Agreement for each of its witnesses and counsel identical to that sent to SBC.

Eschelon asks the ALJ to clarify that the *June 9 Ruling* does not preclude access to confidential information by Eschelon's in-house counsel, and is not meant to extend beyond the uniquely confidential documents enumerated in the order. Eschelon also asks for clarification that the ruling does not preclude access to confidential documents by in-house counsel who have signed the confidentiality agreement. Eschelon suggests restrictions on access should not apply to in-house attorneys who are involved in competitive decision-making. Eschelon claims granting access to such in-house counsel is consistent with the

October 16, 2003 Ruling approving a Protective Agreement in the Triennial Review proceeding (R.95-04-043 / I.95-04-044) which allowed for confidential material to be shared with "counsel of record," without qualification.

Eschelon also objects to the Applicants' "Outside Counsel Only" restriction on all confidential material. Eschelon claims that Applicant's "Outside Counsel Only" restriction is a barrier to parties' due process right of representation, and that this limitation is not found in the confidentiality agreement that the Applicants themselves drafted. When AT&T was challenged by Eschelon to support its assertion that AT&T may decide to bar in-house counsel who have signed the protective agreement from access to confidential material, AT&T responded by citing to an *FCC* protective agreement. (Ex. 6.)

AT&T has produced intervenor's confidential responses to Eschelon's outside counsel, Richard Levin, but has refused to provide redacted versions of the material to Eschelon's in-house counsel, and has failed to provide Eschelon's in-house counsel with parties' discovery responses that were totally public. (Declaration of Richard H. Levin.)

Discussion

Applicants have not provided any justification as to why they have refused to send Eschelon's in-house attorney *public* documents if they were part of a party's response that included any document for which *any level* of confidentiality was asserted. The May 24, 2005 Ruling regarding the Motion to Compel of the Office of Ratepayers Advocates, required that Applicants"explain and justify in specific terms the basis for objections to responding to individual data requests. Applicants shall be required to explain and justify in specific, concise terms the particular basis for refusal to respond to each data request to which they object."

Accordingly, Applicants are hereby ordered to promptly send Eschelon's in-house attorney the applicable *public* documents if they were part of a party's response that included any document for which *any level* of confidentiality was asserted. To the extent that confidential material is contained in any such documents that would not otherwise be accessible to the in-house attorney, Applicants may redact such confidential material from the copy so provided.

On the other hand, Eschelon has not justified why in-house attorneys should be granted access to confidential documents if they do not satisfy the criteria set forth in the June 9 ruling relating to restrictions on marketing activities. As explained by Applicants, the circumstances relating to the TRO proceeding are different than those in this proceeding. The protective order from the TRO proceeding thus does not serve as a precedent governing this proceeding. Accordingly, Applicants shall not be required to provide access to confidential documents to in-house or outside counsel that are involved in marketing or related activities as defined in the June 9th ruling.

Scope of Documents Subject to Confidential Restrictions

The June 9 ALJ ruling establishing procedures to "apply only to those limited categories of documents identified above by the Applicants as 'highly confidential.'" (*June 9 Ruling* at p. 5.) Those documents included four corporate financial exhibits to the original application, the SBC California-specific synergies model, and a map and listing of AT&T locations in California. As to those particular documents, the ALJ limited access to "regulatory counsel and consultants and employees who assist such counsel for case preparation…provided…that they do not engage in any activities for the company relating to developing, planning, marketing, or selling products or

services, determining the costs thereof, or designing prices thereof to be charged to customers." (*Id.* at p. 4.)

Discussion

If there are specific documents over which Eschelon disputes are in fact competitively sensitive within the scope of the restrictions imposed, Eschelon should specifically identify such documents in a further pleading so that an in-camera inspection may be conducted by the ALJ to resolve any such disputes.

Limiting Scope of Discovery Issues

SBC stated that it will block access to any materials it judges to fall outside the issues as stated in Eschelon's Protest. Eschelon asks that Applicants be precluded from applying their own interpretation of what is relevant and subject to discovery. SBC has indicated that it will deny Eschelon witnesses access to material that SBC believes is irrelevant to the issues raised in Eschelon's Protest. Since the issues raised by Eschelon were as broad as the injury to competitors and their ratepayers from the Applicant's proposed market concentration, Eschelon argues that SBC's self-imposed boundaries seem unjustifiable on their face.

Moreover, Eschelon argues that citing to the Protest provides no justification for SBC's withholding discovery that is "relevant to the subject matter involved in the pending action or to the determination of any motion made in that action, if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence." (California Code of Civil Procedure Section 2017(a).)

Applicants respond that while Eschelon expressed only limited concerns with the Application, it has sought access to all of Applicants' responses to other parties' data requests. (Motion at 4.) These include highly competitively-

sensitive business plans, the identity of SBC's customers and expense and revenue information. Eschelon has requested detailed information of AT&T's facilities and customers in California,[3] and has asked questions concerning Eschelon's dispute with AT&T's access charge policies that Applicants contend are irr elevant to this application.[4]

Discussion

Eschelon shall not be prohibited from pursuing discovery merely because Applicants believe that the specific topic of discovery was not expressly mentioned in Eschelon's Protest to the Application. Such a restriction on discovery is extreme and unwarranted. Merely because discovery relates to competitively sensitive issues does not mean that such discovery is improper, particularly since the competitive effects of the AT&T acquisition is one of the issues in the proceeding.

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[3] *See, e.g.,* Dorgan Decl. Ex. 7 (Eschelon DR 1-8 asking for a description of and location of AT&T owned local network facilities in SBC territory in California), Ex. 8 (Eschelon DR 2-4 asking for the total number of VoIP customers subscribed to AT&T's CallVantage service).

[4] *See, e.g.*, Dorgan Decl. Ex. 7 (Eschelon DR 1-15 asking for a list of all CLECs who bill AT&T intrastate access rates in California for which AT&T refuses to pay the bill rates and the amount withheld by AT&T for 2004), Ex. 9 (Eschelon DR 3-1 asking for the amount of access charges AT&T avoided paying to Eschelon as a result of not paying access on what AT&T classified as Enhanced Prepaid Calling Cards).

IT IS RULED that the Motion of Eschelon is granted in part and denied in part in accordance with the discussion above.

Dated June 22, 2005, at San Francisco, California.

/s/ THOMAS R. PULSIFER
Thomas R. Pulsifer
Administrative Law Judge

CERTIFICATE OF SERVICE

I certify that I have by mail, and by electronic mail to the parties for whom an electronic mail address has been provided, this day served a true copy of the original attached Administrative Law Judge's Ruling Regarding Motion to Compel Filed by Eschelon and ATI on all parties of record in this proceeding or their attorneys of record.

Dated June 22, 2005, at San Francisco, California.

/s/ FANNIE SID
Fannie Sid

N O T I C E

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address to insure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.